Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Respondents,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Traffic and Motor Vehicle Safety Act, formerly 15 U.S.C. §§1381-1431, expressly preempt the petitioner's state common law claims based upon the negligent design and the unreasonably dangerous and defective condition of a motor vehicle passenger restraint system which complied with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. §571.208?

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On Petition For A Writ Of Certiorari To The Court Of Appeals Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

Petitioner Erin Dykema respectfully petitions for a writ of certiorari to review the judgments of the Court of Appeals of Wisconsin in this action. The court of appeals held that the National Traffic and Motor Vehicle Safety Act, formerly 15 U.S.C. §§1381-1431, expressly preempts petitioner's common law claims based upon the defective design of a restraint system which complied with Federal Motor Vehicle Safety Standard ("FMVSS") 208. Contrary to the decisions of every federal court of appeals and virtually every state appellate court which has considered

the issue, the Court of Appeals of Wisconsin rejected application of the savings clause in 15 U.S.C. §1397(k) and held that imposition of common law liability for a defect in a motor vehicle which complied with the applicable FMVSS would establish a "safety standard" different than the federal standard, and therefore is expressly preempted by 15 U.S.C. §1392(d).

OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin (App. 1-App. 9) is reported at 189 Wis.2d 206, 525 N.W.2d 754.

The order of the Wisconsin Supreme Court declining to grant review of the decision of the Court of Appeals of Wisconsin (App. 28-App. 29) is not yet reported.

The decision of the Circuit Court for Milwaukee County, Wisconsin, granting petitioner's motion to strike respondents' affirmative defense of federal preemption (App. 10-App. 14) is not reported. The decision of the Circuit Court for Milwaukee County denying respondents' motion to dismiss petitioner's claims on the ground of federal preemption (App. 19-App. 24) is not reported.

JURISDICTION

This case involves the review of judgments of the Court of Appeals of Wisconsin which were entered on February 23, 1995. By order dated February 21, 1995, the Wisconsin Supreme Court declined to review the decision of the Court of Appeals of Wisconsin which was issued on November 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified at all times relevant to this case, provided in pertinent part:

15 U.S.C. §1392

Establishment

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * *

Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or State governments

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement

applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * *

15 U.S.C. §1397

* * *

Continuation of common law liability

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

49 C.F.R. §571.208 S4.1.2.

Included in the appendix.

49 C.F.R. §571.208 S4.5.3.

S4.5.3 Passive belts. Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 A passive belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

STATEMENT OF THE CASE

Contrary to the decisions of the federal courts of appeal and other state appellate courts, the Court of Appeals of Wisconsin held that because the restraint system in petitioner's 1978 Volkswagen Rabbit automobile

complied with FMVSS 208, petitioner's common law claims, based on the failure of the system to incorporate a lap belt or other adequate pelvic restraint, were *expressly* preempted by the National Traffic and Motor Vehicle Safety Act ("Safety Act") pursuant to 15 U.S.C. §1392(d).

I. Federal Regulation Of Restraint Systems.

In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381-1431.[1] The Safety Act contains two provisions addressing the subject of preemption. One is 15 U.S.C. §1392(d),[2] which states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The other provision, referred to as the "savings clause," is set forth in 15 U.S.C. §1397(c),[3] and it provides:

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[1] Effective July 5, 1994, those statutes were recodified, and the statutes regarding motor vehicle safety are now in 49 U.S.C. §30101 et seq. The petitioner will refer to the statutes by their former designation.

[2] This section was recodified with minor changes as 49 U.S.C. §30103(b).

[3] Effective January 31, 1990, §1397(c) was redesignated as §1397(k). Effective July 5, 1994, 15 U.S.C. §1397(k) was recodified with minor changes as 49 U.S.C. §30103(e). Sec. 1397(c) was in effect when petitioner was injured. Because the statute is most commonly referred to in the case law as §1397(k),

Continuation of common law liability

> (c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

The federal regulation at issue in this case is FMVSS 208, which is codified as 49 C.F.R. §571.208 and was promulgated by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the Safety Act. It "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. §571.208 S1.

The version of FMVSS 208 which was in effect when petitioner's 1978 Volkswagen Rabbit was manufactured by Volkswagenwerk AG and sold by Volkswagen of America, Inc. (hereinafter collectively referred to as "VW") provided that with respect to the front outboard seating positions of passenger cars manufactured between September 1, 1973 and August 31, 1981, a manufacturer could comply by providing protection under one of three options:

> Option one – passive protection for all crash modes (frontal, lateral and rollover).
>
> Option two – passive protection for frontal crashes and a Type 1 (lap belt) seat belt assembly.
>
> Option three – manual lap-shoulder belt combination.

49 C.F.R. §571.208, S4.1.2.1-.3 (1978) (App. 34-App. 36)

In 1973, VW developed a restraint system which it designated as "VWRA." That system was incorporated into petitioner's 1978 VW Rabbit and consisted of a diagonal shoulder harness attached to the front door of the

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petitioner will hereinafter refer to the statute by that designation.

automobile. Once the occupant was in the seat and the door closed, the shoulder harness would automatically be in place and thus the system was known as a "passive" system. (App. 3) No lap belt was provided either as a passive or an active component.

VW had determined that the VWRA system was not capable of meeting the crash protection requirements of FMVSS 208 for lateral crashes. (R. Exhibit 234) Therefore, VW petitioned NHTSA to add a fourth option to the FMVSS 208 scheme to permit a passive system which did not meet the lateral crash protection requirements. (*Id.*) NHTSA denied VW's petition, concluding that a fourth option was unnecessary. 39 Fed.Reg. 3834 (January 30, 1974). NHTSA stated as follows:

> Volkswagen petitioned for a new crash protection option under S4.1.2 to permit the introduction and field testing of its passive belt system, which consists of an upper torso restraint and knee padding, in its 1975 model cars. Paragraph S4.5.3 of the standard already permits the use of a passive belt system "to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." Thus, this language permits the use of the Volkswagen passive belt system to meet the perpendicular impact protection requirements of option two and to replace the required seat belt assemblies.

Thus, NHTSA indicated that the VWRA system could comply with option two of FMVSS 208 through S4.5.3, even though the system had no lap belt.

At the time VW developed the VWRA restraint system, sec. S4.5.3 stated in part:

> S4.5.3. Passive belts. Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the

> crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.
>
> S4.5.3.1. A passive belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

The circuit court in this case concluded that the VWRA system complied with FMVSS 208. (R. 151:2-3)

II. Proceedings In The Trial Court.

Petitioner was injured in April, 1988, when the VW Rabbit left the roadway and rolled over. (App. 3) Although she was using the VWRA restraint system, she was ejected from the automobile and rendered quadriplegic when her neck snapped against the shoulder harness.

Petitioner sued VW in state court, asserting negligence and strict products liability claims based on, among other things, the failure to provide an adequate restraint system and the failure to provide a lap belt as part of that system. (R. 34:6-7, 9)

VW raised federal preemption as an affirmative defense. (R. 38:9) Petitioner moved to strike this defense. (R. 40:1-3) She argued that her claims were not preempted by 49 C.F.R. §571.208 pursuant to 15 U.S.C. §1392(d), and that her claims were preserved pursuant to the savings clause set forth in 15 U.S.C. §1397(k). (R. 42:6-20) VW argued that petitioner's claims were preempted pursuant to §1392(d) because imposition of liability in this case would have the effect of eliminating one of the restraint system options set forth in 49 C.F.R. §571.208, S4.1.2, S4.5.3. (R. 44:7-22) The Circuit Court for Milwaukee County, Wisconsin, the Honorable William D. Gardner, Circuit Judge, presiding, granted petitioner's

motion to strike. (R. 313:5-8; App. 10-App. 14) In doing so, the court stated:

> It must be remembered that Plaintiffs' claim is that Defendant's product was defectively designed. The question is not whether the vehicle did or did not have air bags or other passive restraints, but whether the vehicle was defectively designed. There was no attempt by the pleadings here to establish a new safety standard or to find Defendants liable for selecting one NASTA [sic] standard rather than another.

(R. 313:7; App. 13) An order striking the affirmative defense was entered on September 10, 1991. (R. 47; App. 15-App. 18)

On July 13, 1992, the case proceeded to trial, at which time petitioner presented expert opinion testimony that the VW Rabbit was defective and that VW was negligent because the VWRA system failed to provide adequate pelvic restraint and should have had a lap belt, particularly for rollover accidents. (R. 331:187-90, 211-13; 348:110; 349:123-26, 136-39; 342:32-39; 354:129, 183, 187-88; 357:114-22).

At the close of petitioner's case, VW moved for a dismissal of petitioner's lawsuit based on implied and express federal preemption. (R. 168:1) The circuit court denied the motion. (R. 370:3-8; App. 19-App. 24) The court held that the language of §1392(d) "does not relate to common law actions but to state statutes and regulations. Standards are not imposed by verdicts in tort actions." (R. 370:4; App. 21). The court also held that §1397(k) provided a further indication that it was not the intent of Congress to preempt common law tort actions. (R. 370:4; App. 21). The court held that petitioner's claims were neither expressly nor impliedly preempted by the Safety Act, distinguishing this case from the "no air bag"

cases, in which some courts found implied preemption. (R. 370:6-7; App. 22-App. 23)

The jury returned their verdict on September 16, 1992, finding that the VW Rabbit was not defective and that VW was not negligent. (R. 189)

On October 6, 1992, petitioner filed motions after verdict, including a motion for a new trial because of jury contamination and juror misconduct. (R. 204) On December 15, 1992, the circuit court issued a decision denying the motions. (R. 237) On April 1, 1993, judgment was entered in favor of VW dismissing the complaint and awarding costs. (R. 256; App. 25-App. 27) On September 24, 1993, an amended judgment was entered changing the amount of costs. (R. 405)

III. The Decision of The Appellate Court.

After petitioner appealed from the judgment in favor of VW (R. 306), VW cross-appealed from the circuit court's orders denying VW's motion to dismiss and striking the federal preemption defense. (R. 309) Petitioner also subsequently appealed from the amended judgment in favor of VW. (R. 407) In a decision dated November 8, 1994, the Court of Appeals of Wisconsin, relying on its decision in *Boyle v. Chrysler Corp.*, 177 Wis.2d 207, 501 N.W.2d 865 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993), held that petitioner's claims were expressly preempted by federal law, pursuant to 15 U.S.C. §1392(d) and 49 C.F.R. §571.208. (App. 8) Accordingly, the court affirmed the judgments of the circuit court without addressing the issues raised by petitioner. (App. 2-App. 3)

A. The *Boyle* decision.

Because the court of appeals relied upon its decision in *Boyle v. Chrysler Corp.*, a discussion of *Boyle* is necessary.

In *Boyle*, the plaintiff's automobile was equipped with a restraint system which consisted of a manual lap belt/shoulder harness. She claimed that the automobile was defective because it was not equipped with an air bag or other passive restraint. The court of appeals held that the plaintiff's claim was expressly preempted by §1392(d). After quoting §1392(d), the court stated:

> One of the options [in FMVSS 208] is the manual lap and shoulder seat belts for each front outboard seating position, with which the 1980 Plymouth Horizon was equipped. Because Chrysler elected to equip the Horizon with restraints authorized by the code, it is within the purview of the explicit preemption provision prohibiting states from requiring different restraints.

177 Wis.2d at 217, 501 N.W.2d at 869.

The court rejected Boyle's argument that §1392(d) only preempted a state "safety standard" and not common law tort claims:

> Boyle contends that because the explicit preemption clause does not specifically preempt common-law claims, they are not explicitly preempted. However, the United States Supreme Court recognized that, for purposes of preemption law, "the phrase 'state law' . . . include[s] common law as well as statutes and regulations." *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2620 (1992).

177 Wis.2d at 217, 501 N.W.2d at 869.

The court also rejected Boyle's argument based on the savings clause in §1397(k). 177 Wis.2d at 218, 501

N.W.2d at 869-70. The court reasoned that "the savings clause preserves only those common-law liability claims that do not conflict with the automobile safety equipment standards that Congress enacted." 177 Wis.2d at 218, 501 N.W.2d at 869.

The court also held that Boyle's claim was impliedly preempted by the Safety Act. 177 Wis.2d at 219-22, 501 N.W.2d at 870-71. The court relied on several federal cases, including *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), which held that the Safety Act impliedly preempts claims based on manufacturers' failure to equip their vehicles with air bags.

B. The *Dykema* decision.

In deciding this case, the Wisconsin court did not discuss its reasoning in detail, but merely held that *Boyle* was not distinguishable from this case, and concluded "that the holding and analysis in *Boyle* controls." (App. 8) The court held that petitioner's common law claims would result in establishing a "safety standard" different from the federal standard and were, therefore, expressly preempted pursuant to 15 U.S.C. §1392(d). The court's actual holding consists of the following paragraph:

> The VWRA system with which VW elected to equip the 1978 Volkswagen Rabbit complies with the requirements of FMVSS 208, and therefore "is within the purview of the explicit preemption provision prohibiting states from requiring different restraints." *Id.* [*Boyle*] at 217, 501 N.W.2d at 869. Thus, Dykema's claims, which were based upon VW's alleged failure to provide reasonably adequate lower pelvic restraint, would establish a different safety standard from that required by federal law. *Boyle*

> specifically states that such claims are preempted. *Id; see Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2620 (1992) (holding that for purposes of federal preemption, state law includes statutes, regulations, *and* common-law actions).

(Emphasis in the original.) (App. 8)

Petitioner filed a petition requesting the Wisconsin Supreme Court to review the decision of the court of appeals. On February 21, 1995, the Wisconsin Supreme Court denied the petition for review. (App. 28-App. 29) On February 23, 1995, the court of appeals issued judgments affirming the judgments of the circuit court. (App. 30-App. 33)

REASONS FOR GRANTING THE WRIT

This case squarely presents the issues of whether the term "safety standard" as used in the preemption clause in 15 U.S.C. §1392(d) refers to common law tort liability and what is the effect of the savings clause in 15 U.S.C. §1397(k). These issues were argued by the parties and amici curiae in *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995), but because the Court concluded that there was no applicable federal safety standard in that case, the Court did not address those issues. Because this case involves an applicable federal standard and only an issue of express preemption, it provides the Court with the perfect opportunity to resolve the conflicts concerning the statutory interpretation of the Safety Act's preemption clause and savings clause.

The decision of the Court of Appeals of Wisconsin that petitioner's state common law claims alleging a defect in a restraint system which complied with FMVSS 208 are *expressly* preempted by the Safety Act by virtue of 15 U.S.C. §1392(d) is in conflict with the decisions of all of the federal courts of appeal which have considered the issue. *See, e.g., Taylor v. General Motors Corp.*, 875 F.2d 816

(11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and other cases cited in the discussion below.

Express preemption under the Safety Act has also been rejected in decisions of other state appellate courts, including some involving restraint systems identical to the system in this case. For example, this Court recently considered a petition for a writ of certiorari with regard to the decision of the Arizona Supreme Court in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994), which involved identical claims with regard to the identical restraint system in this case. As is discussed below, although this Court in *Volkswagen of America, Inc. v. Hernandez-Gomez* (U.S. May 1, 1995) (No. 94-1305), vacated the judgment in *Hernandez-Gomez* and remanded the case to the Arizona Supreme Court, the Arizona Supreme Court's analysis and rejection of express preemption would appear to be unaffected by the vacation and remand. *See also Hyundai Motor Co. v. Phillip*, 639 So.2d 1064, 1066 (Fla. App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995). Thus, in Arizona and Florida, petitioner Erin Dykema's claims would not be found expressly preempted by the state court, but because she lives in Wisconsin, they are.

Although the court of appeals in this case relied on *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S.Ct. 2608, 2620 (1992), in support of its interpretation of §1392(d) (App. 8), *Cipollone* did not warrant the court of appeals' departure from the reasoning of the federal circuit courts with regard to express preemption, because *Cipollone* involved a preemption provision worded much more broadly than §1392(d). Indeed, subsequent to *Cipollone*, state appellate courts have found no express preemption of common law claims under the Safety Act.

Besides conflicting with the controlling decisions of the federal courts of appeal and decisions of other state

appellate courts, the court of appeals' decision in this case conflicts with its own analysis of express preemption in *Derby v. Brenner Tank, Inc.*, 187 Wis.2d 244, 522 N.W.2d 274 (Ct.App. 1994), *review denied*, ___ Wis.2d ___, 527 N.W.2d 335 (1994). Both cases involved the interpretation of 15 U.S.C. §1392(d) and §1397(k). In *Derby*, the court construed the two provisions together and held that the imposition of liability under state common law is not encompassed by the term "safety standard" in §1392(d), but in this case, the court reached the opposite conclusions. The conflict has left the courts of Wisconsin with no guidance on the issue.

I. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER'S CLAIMS ARE EXPRESSLY PREEMPTED BY THE SAFETY ACT IS CONTRARY TO ALL OF THE DECISIONS OF THE FEDERAL COURTS OF APPEAL AND MANY OF THE DECISIONS OF THE STATE APPELLATE COURTS WHICH HAVE CONSIDERED THE ISSUE.

The court of appeals' conclusion in this case that petitioner's claims alleging a defect in a motor vehicle which complied with the applicable federal standard are expressly preempted by the Safety Act conflicts with the decisions of every federal court of appeals which has considered the issue. *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 780-81 (3rd Cir. 1992); *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257, 1264 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1120-21 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d at 824-25; *Wood v. General Motors Corp.*, 865 F.2d 395, 407 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). *See also*: *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

The court of appeals' finding of express preemption in this case was premised only on its interpretation of

§1392(d). The court did not specifically discuss the savings clause in §1397(k). However, by relying on its decision in *Boyle*, 177 Wis.2d at 218-19, 501 N.W.2d at 869-70, which held that §1397(k) does not preserve state law claims which conflict with the applicable federal safety standards, the court implicitly held that §1397(k) cannot serve to preclude the express preemption of common law claims.

In interpreting §1392(d) to support a finding of express preemption, the court of appeals failed to give due consideration to the well-established rule which presumes that the only state action which is preempted is that which Congress has clearly indicated to be preempted. *E.g., Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 715 (1985); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The federal courts of appeal have heeded that rule and held that the issue of express preemption under the Safety Act can be resolved only after considering §1392(d) together with §1397(k). Having done so, they concluded that the two provisions made ambiguous Congress' intent with respect to the preemption of common law claims and thus could not support a determination of express preemption. *Perry*, 957 F.2d at 1264; *Pokorny*, 902 F.2d at 1120; *Taylor*, 875 F.2d at 824; *Wood*, 865 F.2d at 402. *See also, Buzzard*, 966 F.2d at 780-81, relying on *Pokorny*. Two of those courts also found Congress' choice of the words "safety standard" significant, and reasoned that in the absence of some explicit reference to "common law," there was no basis for inferring that Congress intended §1392(d) to expressly preempt common law damage claims. *Pokorny*, 902 F.2d at 1121; *Taylor*, 875 F.2d at 824.

The First Circuit was the first federal appeals court to address the issue in *Wood*. In that case, the plaintiff sought to hold a vehicle manufacturer liable for failing to

install air bags. The court found the Safety Act to be "facially ambiguous" in a case alleging a design defect in a vehicle complying with FMVSS 208. 865 F.2d at 401. The court noted that the finding needed for the plaintiff to be successful on her design defect claim would be "tantamount to announcing a state safety standard," which, "if promulgated by state statute or regulation, would be preempted by the clear commands of section 1392(d)." *Id.* However, the court reasoned that §1397(c), which could not be ignored, arguably preserved a court's right to create such a standard even though it conflicted with the applicable federal standard. *Id.* The court concluded that §1397(c) made it impossible for the court to determine that §1392(d) expressly preempted a state tort action. The court reasoned:

> [G]iven Congress's failure to foresee [the problem present in this case], we are not persuaded that section 1392(d) can be construed to manifest an *express* intention to preempt state design lawsuits having the present effect. By the same token, we do not construe the general language of section 1397(c) as intended to preserve the narrow class of design lawsuits that give rise to a conflicting state safety standard.

(Emphasis in the original.) 865 F.2d at 402.

In *Taylor*, 875 F.2d at 824, which was factually similar to *Wood*, the Eleventh Circuit noted that §1392(d) conflicted with the savings clause, but rejected the argument that the savings clause "preserv[ed] common law liability only for those automobile safety defects that are not specifically addressed by a Safety Standard." The court reasoned that such an interpretation would render the savings clause redundant since the preemption clause itself states that if a federal standard does not govern "the same aspect of performance" as the state standard, the state standard is not preempted. *Id.* The court also

noted that the preemption clause does not refer to "common law," although Congress had used that term in other statutes:

> An additional factor militating against a finding that the language of the Safety Act expressly preempts appellants' claims is that Congress did not make explicit reference to state common law in the Act's preemption clause as it has in the preemption clauses of many other statutes. Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires. *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), -18(e) (Supp.V 1987) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. §301(a) (1982) (preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a), (c)(1) (1982) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). The absence of such an explicit reference to state common law in the Safety Act's preemption clause therefore counsels against a finding of express preemption.

875 F.2d at 824-25.

Because of the conflict between the language of §1392(d) and §1397(k) and Congress' failure to explicitly refer to "common law" in §1392(d), the court concluded that "the Safety Act cannot be construed as unambiguously manifesting an intention to preempt . . . common law claims." 875 F.2d at 824-25.

In *Pokorny*, 902 F.2d 1116, the plaintiff's van, which was equipped with manual lap-shoulder seat belts, was alleged to be defectively designed because it was not equipped with air bags, automatic seat belts, or protective

netting on the windows. The Third Circuit held that none of the plaintiff's claims was expressly preempted by the Safety Act, reasoning that "[t]he question of express preemption is properly analyzed only after considering both §1392(d) *and* §1397(k)." (Emphasis in the original.) 902 F.2d at 1120. Moreover, agreeing with *Taylor*, the court refused to interpret §1397(k) narrowly so that it would only apply to common law actions which were beyond the purview of the Safety Act, since such a construction would render the savings clause redundant. 902 F.2d at 1121. Finally, the Third Circuit noted "that §1392(d), the preemption provision, does not specifically mention common law liability." *Id.*

In *Perry*, 957 F.2d 1257, the plaintiff sought to hold the vehicle manufacturer liable for a defectively designed air bag system. Reading §1392(d) together with §1397(k), the Fifth Circuit held that Congress did not expressly preempt the plaintiff's claim. 957 F.2d at 1264.

In *Buzzard*, 966 F.2d 777, the plaintiffs claimed that a truck trailer which complied with the lighting requirements of FMVSS 108 had insufficient lighting or reflective devices. The Third Circuit relied on its interpretation of §1392(d) and §1397(k) in *Pokorny* and held that the claims were not expressly preempted by the Safety Act. 966 F.2d at 780-81.

The determination of the Wisconsin court that petitioner's claims are expressly preempted pursuant to §1392(d) obviously conflicts with the decisions of the federal circuit courts cited above. In failing to discuss §1397(k), except implicitly by its reliance on its decision in *Boyle*, where the statute was briefly discussed, the court of appeals ignored the principal factor on which the federal circuit courts relied in finding no express preemption.

Various state appellate courts have also concluded that §1392(d) does not expressly preempt claims based upon defects in motor vehicle restraint systems which complied with FMVSS 208. *Hyundai Motor Co. v. Phillip*, 639 So.2d at 1066; *Wilson v. Pleasant*, 645 N.E.2d 638, 641 (Ind.App. 1994); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo.App. 1994); *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 320-21 (Pa.Super. 1989); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570, 576 (Tex.App. 1993).

Federal district courts have reached the same conclusion in cases involving motor vehicle restraint systems. *Heath v. General Motors Corp.*, 756 F.Supp. 1144, 1147 (S.D.Ind. 1991); *Dallas v. General Motors Corp.*, 725 F.Supp. 902, 904-05 (W.D.Tex. 1989); *Kolbeck v. General Motors Corp.*, 702 F.Supp. 532, 536-38 (E.D.Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F.Supp. 270, 272 (N.D.Ga. 1987); *Schick v. Chrysler Corp.*, 675 F.Supp. 1183, 1184 (D.S.D. 1987); *Garrett v. Ford Motor Co.*, 684 F.Supp. 407, 409 (D.Md. 1987); *Murphy v. Nissan Motor Corp.*, 650 F.Supp. 922, 925-26 (E.D.N.Y. 1987); *Baird v. General Motors Corp.*, 654 F.Supp. 28, 30 (N.D.Ohio 1986). The same conclusion has also been reached by federal district courts in cases involving an alleged defect in some other item of motor vehicle equipment. *Contant v. Kawasaki Motors Corp.*, 848 F.Supp. 170, 172-73 (M.D.Fla. 1994); *Byrnes v. Honda Motor Co., Ltd.*, 845 F.Supp. 875, 876-77 (S.D.Fla. 1994); *Jordan v. Paccar, Inc.*, 792 F.Supp. 545, 548 (N.D.Ohio 1992); *Richards v. Michelin Tire Corp.*, 786 F.Supp. 959, 962 (S.D.Ala. 1992); *Swope v. STI Transit Co.*, 796 F.Supp. 160, 162 (E.D.Pa. 1992); *Welsh v. Century Products, Inc.*, 745 F.Supp. 313, 317 (D.Md. 1990).

In finding express preemption, the court of appeals implicitly relied on its approval in *Boyle*, 177 Wis.2d at 218, 501 N.W.2d at 869, of three cases in which the courts

held that §1392(d) expressly preempts common law damage claims. *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095, 1096-97 (E.D.Mo. 1986); *Cox v. Baltimore County*, 646 F.Supp. 761, 763 (D.Md. 1986); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838, 840 (Minn.Ct.App. 1987), *cert. denied*, 487 U.S. 1236 (1988). Those cases represent the minority view on this issue and their conclusion was rejected by the more recent federal court of appeals cases. *Taylor*, 875 F.2d at 824; *Pokorny*, 902 F.2d at 1120-21. *Vanover, Cox, Wickstrom, Wattelet v. Toyota Motor Co.*, 676 F.Supp. 1039 (D.Mont. 1987); *Montag v. Honda Motor Co., Ltd.*, 856 F.Supp. 574 (D.Colo. 1994); and *Miranda v. Fridman*, 647 A.2d 167 (N.J.Super. 1994), along with *Boyle* and this case, are the only cases in the country which have held that the Safety Act expressly preempts common law tort liability for motor vehicle defects.

II. THE WISCONSIN COURT OF APPEALS MISINTERPRETED *CIPOLLONE* AS PROVIDING SUPPORT FOR ITS FINDING OF EXPRESS PREEMPTION.

The court of appeals' conclusion in this case that imposition of liability on petitioner's common law claims would establish a state "safety standard" was based upon this Court's interpretation in *Cipollone* of section 5(b) of the Public Health Cigarette Smoking Act of 1969. That section provided:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

This Court noted that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that

take the form of common law rules," and concluded that the phrase "State law" would include the common law as well as statutes and regulations. 112 S.Ct. at 2620.

The interpretation of the preemption provision in *Cipollone* does not support the conclusion that §1392(d) preempts common law tort claims. The words in the statute in *Cipollone*, "requirement or prohibition . . . imposed under State law," are much broader that the term "safety standard" in §1392(d). Moreover, although *Cipollone* determined that the term "state law" includes common law, §1392(d) does not contain the terms "state law" or "common law". Given the presumption against preemption, the fact that the Court held that the phrase "no requirement or prohibition . . . imposed under State law" would encompass state common law does not lead to the conclusion that the term "safety standard" in §1392(d) includes common law. Also, the statute at issue in *Cipollone* did not have a savings clause.

The federal circuit courts' pre-*Cipollone* interpretation of §1392(d) and §1397(k) as supporting the conclusion that common law claims of motor vehicle defect are not expressly preempted by the Safety Act was not affected by this Court's interpretation in *Cipollone* of a different and more broadly worded preemption provision. Indeed, in *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995), the Eleventh Circuit stated that its analysis of express preemption under §1392(d) in *Taylor* was "unchanged by *Cipollone*." 13 F.3d at 1521. Moreover, numerous state appellate court decisions, cited earlier, issued subsequent to *Cipollone* found no express preemption under the Safety Act. *Hyundai Motor Co. v. Phillip*; *Wilson v. Pleasant*; *Loulos v. Dick Smith Ford, Inc.*; *Marrs v. Ford Motor Co.*

The Wisconsin court's interpretation of *Cipollone* conflicts with these decisions.

III. OTHER STATES HAVE REJECTED EXPRESS PREEMPTION IN CASES INVOLVING IDENTICAL CLAIMS.

Petitioner's claims in this case are not the same as the claims in the so-called "no air bag" cases. This case involves a restraint system which had a passive shoulder harness, but no lap belt, and state courts in cases involving the same restraint system have found no express federal preemption.

This Court recently considered a petition for a writ of certiorari with regard to the decision of the Arizona Supreme Court in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez* (U.S. May 1, 1995) (No. 94-1305). In *Hernandez-Gomez*, the plaintiff's 1981 Volkswagen Rabbit flipped over and landed on its roof. The car was equipped with the same restraint system as in this case – the automatic shoulder harness attached to the door, but no manual or automatic lap belt. The plaintiff claimed that the absence of a lap belt made the car defective and unreasonably dangerous. Defendant VW claimed that the plaintiff's claims were preempted by the Safety Act. The Supreme Court of Arizona, construing the preemption and savings clauses of the Safety Act together, concluded that there was no express preemption, and, following *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995), went on to find that since the text of the Safety Act provided a reliable indicium of Congressional intent with regard to preemption, the rule of *Cipollone* ended the need to infer

or imply Congressional intent to preempt. VW petitioned this Court for a writ of certiorari. This Court granted VW's petition and vacated the judgment and remanded the case to the Supreme Court of Arizona for further consideration in light of this Court's decision in *Freightlinger Corp. v. Myrick* to the effect that *Cipollone* did not establish a rule that implied preemption analysis is precluded by the presence of an express preemption clause. Thus, the indication is that on remand, the Arizona Supreme Court is to readdress the question of implied preemption. There is every reason to believe that the Arizona Supreme Court's conclusion that there was no express preemption will be unchanged after a decision on remand is rendered.

In *Hyundai Motor Co. v. Phillip*, 639 So.2d 1064 (Fla. App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995), the plaintiff claimed negligence and strict liability in the design of the 1988 Hyundai Excel restraint system, which is identical to the restraint system involved in this case – the automatic two-point shoulder harness without a lap belt. Hyundai contended that the Safety Act preempted the plaintiff's claim that the car was defective because of the lack of a lap belt. The Third District Court of Appeal of Florida disagreed, relying on *Perry*, *Taylor* and *Wood*. On January 17, 1995, this Court denied Hyundai's petition for a writ of certiorari.

Therefore, in identical cases, the rule on the question of federal preemption in Wisconsin is in direct conflict with rulings in the states of Arizona and Florida. If petitioner lived in Florida or Arizona, her claims would not have been found to be expressly preempted by federal law, but because she lives and was injured in Wisconsin, her claims were found to be expressly preempted. In order that citizens of the various states are treated the

same under the federal law, this Court should review the Wisconsin court's decision.

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH ITS OWN DECISION IN *DERBY*.

Two months before it issued its opinion in this case, the court of appeals issued its opinion in *Derby v. Brenner Tank, Inc.*, 187 Wis.2d 244, 522 N.W.2d 274. The court's interpretation of §1392(d) in *Derby* conflicts with its interpretation of that statute in this case.

In *Derby*, claims were brought against the manufacturer of a trailer based upon the failure to equip the trailer with reflective tape. The lighting and reflectors on the trailer complied with FMVSS 108. The court of appeals held that the plaintiffs' claims were not expressly or impliedly preempted by the Safety Act. The court relied on *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, which also involved a claim that a truck trailer which complied with FMVSS 108 had insufficient lighting or reflective devices. In *Buzzard*, the Third Circuit determined that the claim was not expressly preempted by the Safety Act, relying on its interpretation of §1392(d) and §1397(k) in *Pokorny*, 902 F.2d at 1121. *Buzzard*, 966 F.2d at 780-81.

In *Derby*, 187 Wis.2d at 249-50, 522 N.W.2d at 276, the Wisconsin court agreed with *Buzzard*'s interpretation of §1392(d) and §1397(k), which was based on *Pokorny*:

> *Buzzard* concluded that Congress did not preempt state common-law by explicit language . . . , noting that the Safety Act has both a preemption clause, §1392(d), and a savings clause, §1397(k). *Buzzard*, 966 F.2d at 780. *Buzzard* refused to construe the savings clause so narrowly that it would apply only to common-

> law actions wholly beyond the Safety Act's purview, motor vehicle safety equipment, because it would deprive the savings clause of any practical effect. *Id.* at 780-81.

The court of appeals' decisions in *Derby* and this case are obviously in conflict. In *Derby* the court rejected a limited construction of the savings clause in §1397(k) and construed it together with the preemption clause in §1392(d). In this case and in *Boyle*, the court did the opposite, finding that the term "safety standard" in the preemption clause was broad enough to encompass common law claims, and that the savings clause only applied to claims that do not conflict with the federal safety standards. In this case and *Boyle*, the court rejected *Pokorny's* analysis of the statutes with regard to the express preemption issue, but in *Derby* the court embraced that analysis by relying on *Buzzard* which was based on *Pokorny*.

The court of appeals in this case held that it was justified in reaching a conclusion which differed from its conclusion in *Derby*, because the cases involved different federal motor vehicle safety standards. (App. 7-App. 8, fn. 4) However, the difference in the type of safety standard involved did not warrant the court in construing §1392(d) and §1397(k) in two different ways.

Resolution of the express preemption issue depends initially upon whether imposition of state common law liability results in the establishment of a state "safety standard" as set forth in §1392(d) and whether that claim is "saved" by the savings clause in §1397(k). The interpretation of these statutes should be the same regardless of the specific federal safety standard involved.

This is demonstrated by the Third Circuit's decisions in *Pokorny* and *Buzzard*. *Pokorny* involved FMVSS 208 and *Buzzard* involved FMVSS 108. Yet, the court in *Buzzard*

held that its reasoning regarding express preemption in *Pokorny* was applicable. *Buzzard*, 966 F.2d at 780-81.

Therefore, there is no justification for the conflicting decisions in this case and *Derby*, and the attempt to distinguish the cases based on different safety standards simply compounds the Wisconsin court's conflict with the federal circuit court decisions.

V. EXPRESS PREEMPTION IS THE ONLY ISSUE PRESENTED; THE ISSUE OF IMPLIED PREEMPTION MAY BE REMANDED TO THE WISCONSIN COURT.

The affirmance of the dismissal of petitioner's claims was based solely upon the Wisconsin court's finding of express preemption under the Safety Act. Having found express preemption, the court did not address the issue of whether the claims were impliedly preempted. Therefore, only the sharply defined issue of express preemption under the statutory interpretation of the language of the Safety Act is presented.

The key questions in the statutory interpretation of the Act are: (1) whether the term "safety standard" in 15 U.S.C. §1392(d) includes only statutes and regulations, but not common law, and (2) whether the savings clause, §1397(k), does not permit a manufacturer to use a federal safety standard to immunize itself from state common-law liability. The group of citizens and litigants who are deeply enmeshed in the issues of automotive litigation anticipated that these questions might be decided in *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483, but they were not because ultimately it turned out that in *Myrick* those questions were not presented in the right context. In this case, these two issues are squarely presented.

Also, the question of implied preemption is not presented, because the Wisconsin court did not address it. Although this Court could address the issue of implied preemption, since it is purely a question of law which would be reviewed *de novo*, in the event the Court rejects the finding of express preemption, the matter could be remanded to the Court of Appeals of Wisconsin for determination of the issue of implied preemption.

There would be some merit to remanding the issue of implied preemption, because:

> (1) There is no decision under Wisconsin law on the subject of implied preemption of defect claims specifically like those raised in this case, and
>
> (2) If this Court were to conclude that the term "safety standard" in the preemption clause in §1392(d) does not include common law claims and judgments and/or that the savings clause of §1397(k) does not permit the manufacturer to use a federal safety standard to immunize itself from state common-law liability, then the landscape of implied preemption analysis under the Safety Act would be changed.

Although the Wisconsin court held that its "holding in *Boyle* controls the disposition of this case," (App. 7) and although in *Boyle* the court found implied preemption, one cannot leap to the conclusion that by relying on *Boyle*, the Wisconsin court would necessarily determine that petitioner's claims in this case are impliedly preempted. Such a conclusion is foreclosed by the fact that the claims in this case are different from the claims in *Boyle*.

In *Boyle*, the plaintiff's claim was based upon the manufacturer's failure to install air bags and passive

restraints. It was that claim which was found to be impliedly preempted. *Boyle*, 177 Wis.2d at 220, 501 N.W.2d at 870.

In this case, petitioner claimed that the VW Rabbit was defective because the VWRA restraint system failed to provide adequate pelvic restraint, including a manual lap belt. An implied preemption analysis would require a determination of whether imposing liability on VW for failing to provide adequate pelvic restraint or install a lap belt would conflict with the federal law. No such analysis was made by the court of appeals in either *Boyle* or this case. *Boyle's* conclusion as to implied preemption of passive restraint claims is not applicable to *all* claims involving any type of motor vehicle restraint. *See, e.g., Perry v. Mercedes Benz of North America, Inc.*, (claim that air bag system which complied with federal standards was defective because the deceleration rate triggering its deployment should have been lower was not impliedly preempted, although claim for lack of air bag was); *Pokorny v. Ford Motor Co.* (claim that car should have had protective window netting to prevent ejection was not impliedly preempted, although claim for lack of air bag was). Petitioner's claim here is similar to the claims in *Perry* and *Pokorny* which would merely have required the manufacturer to exceed the federal minimum standards.

Also, any implied preemption analysis will be affected by this Court's interpretation of the term "safety standard" in the preemption clause and its interpretation of the effect of the savings clause. In *Freightliner Corp. v. Myrick*, 514 U.S. at ___, 115 S.Ct. at 1488, the Court indicated that there is an inference that an express preemption clause could foreclose implied preemption. Whether implied preemption is foreclosed under the Safety Act, therefore, depends to some degree on this

Court's instruction as to the scope of express preemption under the Safety Act.

Based on all of the above, therefore, the Wisconsin court's finding of express preemption presents the perfect opportunity for this Court to resolve the conflicts concerning the statutory interpretation of the Safety Act's preemption clause and savings clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS
DECISION
DATED AND RELEASED

November 08, 1994

Nos. 93-1341
93-2579

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

ERIN DYKEMA,

Plaintiff-Appellant-Cross Respondent,

v.

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Defendants-Respondents-Cross Appellants,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants-Respondents.

ERIN DYKEMA,

Plaintiff-Appellant,

v.

VOLKSWAGENWERK AG, a foreign corporation, and VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Defendants-Respondents,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

SULLIVAN, J. Erin Dykema appeals from judgments,[1] after a jury trial, dismissing her causes of action against Volkswagenwerk AG, and Volkswagen of America, Inc. (collectively, "VW"), for common law and strict liability negligence resulting in the personal injuries she received in a one-automobile collision. VW cross-appeals from the judgments.

Dykema presents one issue for our review: whether the trial court erroneously exercised its discretion when it denied Dykema's post-verdict motion for a new trial because of alleged jury contamination and misconduct. On cross-appeal, VW argues that the trial court erred when it failed to dismiss Dykema's causes of action based upon federal preemption by Section 1392(d) of the Federal Motor Vehicle Safety Act of 1966, and Federal Motor Vehicle Safety Standard 208. Because we conclude that Dykema's causes of action were federally preempted, we

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[1] In Case No. 93-1341, Dykema appeals from a final judgment entered on April 1, 1993, dismissing her complaint and awarding VW $51,730.07 in costs. On September 24, 1993, the trial court issued an amended judgment reducing the previously awarded costs to $46,881.14. In Case No. 93-2579, Dykema appeals from the amended judgment. Pursuant to our order on October 21, 1993, Case Nos. 93-1341 and 93-2579 were consolidated for purposes of appeal. The briefs in Case No. 93-1341 were allowed to stand as the briefs in Case No. 93-2579, pursuant to our orders on January 3, 1994, and March 28, 1994. Thus, the issues raised in both cases are identical.

affirm the trial court's judgments that dismissed the actions.[2]

Dykema was rendered a quadriplegic on April 16, 1988, when the 1978 Volkswagen Rabbit, in which she was the driver and sole occupant, left the road and rolled over. No other vehicles were involved in the collision. The Rabbit was equipped with a passive-restraint system that featured a two-point body restraint, a knee bar, and a ramped seat. The system, known as the VWRA, was automatically engaged when drivers positioned themselves in the seat.

At trial, Dykema argued that the restraint system would have been safer if it had been equipped with a manual lap belt. Expository of her position, she presented Dr. Kenneth Saczalski, an expert in accident reconstruction and body kinematics, who testified that the VWRA is "basically an incomplete restraint system. They [VW] just didn't finish the job. They didn't put in the lap belt. In my opinion, that is what caused the injuries."

At the conclusion of Dykema's case-in-chief, VW moved the court for a dismissal, arguing that federal preemption deprived the state courts of subject matter jurisdiction. VW argued that Dykema's claims relating to the alleged lack of reasonably adequate lower pelvic restraint in the VWRA system were preempted by federal

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[2] Because we conclude federal law preempts Dykema's causes of action, we do not address the issue of alleged jury contamination and misconduct presented in Dykema's appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

law governing automobile safety standards. The trial court denied VW's motion, stating:

> Plaintiff's claim is not impliedly preempted by the Safety Act. The addition of a lap belt or other type of torso restraint wouldn't conflict with the federal standards, but would supplement them. The compensation of victims, a function of state law, sets it apart from direct forms of regulations and a manufacturer may choose a variety of actions to avoid liability or lessen its impact. Common law is not regulation.

At the conclusion of the eight-week trial, the jury found that the 1978 Volkswagen Rabbit was not defectively designed and that VW was not negligent. The trial court entered a judgment dismissing Dykema's complaint. Dykema appeals this judgment and VW cross-appeals.

VW argues that, as a matter of law, Dykema's strict liability and negligence claims were federally preempted and, therefore, the trial court erred when it denied VW's motion to dismiss at the close of Dykema's case-in-chief. We agree.

Federal preemption of a matter deprives a state court of subject matter jurisdiction. ***Mulhern v. Outboard Marine Corp.***, 146 Wis.2d 604, 614, 432 N.W.2d 130, 134 (Ct. App. 1988). Whether a court has subject matter jurisdiction is a legal issue for which we accord no deference to the conclusions of the trial court. *See* ***Gonzales v. AM Community Credit Union***, 150 Wis.2d 773, 777, 442 N.W.2d 536, 537 (Ct. App. 1989).

In 1966, Congress determined that because of the "centralized, mass production, high volume character" of the manufacture of automobiles, the nation required

safety standards that were uniformly enforced. S. REP. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. Congress concluded that the "primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. REP. No. 1301, at 4, *reprinted in* 1966 U.S.C.C.A.N. at 2712.

Accordingly, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 15 U.S.C. § 1381, *et. seq.*, that directed that United States Department of Transportation and its sub-agency, the National Highway Traffic Safety Administration (NHTSA), to issue federal motor vehicle safety standards. The Safety Act provides for the supremacy of these federal standards and declares, in part, that:

> Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d).

Pursuant to the Safety Act, NHTSA promulgated Federal Motor Vehicle Safety Standard 208 (FMVSS 208) that regulated motor vehicle occupant crash protection. 49 C.F.R. 571.208. FMVSS 208 requires all passenger cars manufactured between September 1, 1973, and September 1, 1986, to possess one of three types of crash protection: (1) passive restraints for all crashes; (2) passive restraints

for head-on crashes plus manual belts; or (3) manual three-point seat belts. 49 C.F.R. § 571.208, S4.1.2.1-3. Additionally, FMVSS 208 states that a manufacturer could install an automatic belt "that requires no action by vehicle occupants" to meet the standards of § 571.208, S4, and in place of the "seat belt assembly" required by option S4.1.2.2. 49 C.F.R. § 571.208, S4.5.3. NHTSA, in 1974, ruled that the VWRA system at issue in this case was an authorized means to comply with FMVSS 208's second option. 39 Fed. Reg. 3834 (1974).

Throughout the pretrial motions, the trial, and on appeal, Dykema has never argued that the VWRA system did not comply with the requirements of FMVSS 208. Indeed, at oral argument, Dykema stated that she did not dispute the fact that the VWRA complied with the standard. Dykema argues, however, that the VWRA provides inadequate lower pelvic restraint and, therefore, a state tort claim is a valid action to redress her injuries. VW argues that state common-law tort claims are preempted by 15 U.S.C. § 1392(d) if they require a non-identical safety standard to that under FMVSS 208.

We recently addressed this contention, albeit in a slightly different form, in ***Boyle v. Chrysler Corp.***, 177 Wis.2d 207, 501 N.W.2d 865 (Ct. App. 1993). In ***Boyle***, we stated: "[W]e conclude that compliance with the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (1982), and the Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1979) . . . preempt[s] state law claims based on the absence of airbags or other passive restraints. . . . " ***Id.*** at 213, 501 N.W.2d at 867.

Accordingly, contrary to Dykema's attempts at oral argument and in her appellate briefs to distinguish the applicability of ***Boyle*** solely to "absence of airbag cases,"[3] we conclude that our holding in ***Boyle*** controls the disposition of this case.[4]

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[3] We note that other jurisdictions have reached divergent conclusions regarding federal preemption of state common-law claims under 15 U.S.C. § 1392. *See* ***Myrick v. Fruehauf Corp.,*** 13 F.3d 1516 (11th Cir.) (holding state common-law claims for failure to install anti-lock brakes in tractor-trailer truck are not preempted by National Traffic and Motor Vehicle Safety Act (the "Safety Act")), *cert. granted sub nom.,* ***Freightliner Corp. v. Myrick,*** 63 U.S.L.W. 3282, 63 U.S.L.W. 3291 (U.S. Oct. 7, 1994) (No. 94-286); ***Perry v. Mercedes Benz of North America, Inc.,*** 957 F.2d 1257 (5th Cir. 1992) (declaring state claims that are based on defective design of automobile airbags are not preempted by the Safety Act); ***Pokorny v. Ford Motor Co.,*** 902 F.2d 1116 (3d Cir.) (holding state claim that van was defectively designed because it was not equipped with airbags or automatic seat belts was impliedly preempted, but claim that van was defective because it lacked protective netting over windows was not preempted), *cert. denied,* 498 U.S. 853 (1990); ***Estate of Montag v. Honda Motor Co.,*** 856 F. Supp. 574 (D. Colo. 1994) (finding state claim for failure to install airbags is federally preempted by the Safety Act); ***Richards v. Michelin Tire Corp.,*** 786 F. Supp. 959 (S.D. Ala. 1992) (finding state claim against tire manufacturer for failure to warn is not preempted by the Safety Act); ***Loulos v. Dick Smith Ford, Inc.,*** 882 S.W.2d 149 (Mo. Ct. App. 1994) (holding state claim for failure to equip automobile with airbag is not preempted by the Safety Act).

[4] Subsequent to oral argument in this case, a different panel of this court released ***Derby v. Brenner Tank, Inc.,*** No. 93-3466 (Ct. App. Aug. 30, 1994) (ordered published on September 27, 1994), that concluded 15 U.S.C. § 1392 did not federally preempt state common-law claims based on standards differing from Federal Motor Vehicle Safety Standard 108, 49 C.F.R. § 571.108, which regulated illumination on tractor-trailer trucks. ***Id.,*** slip

The VWRA system with which VW elected to equip the 1978 Volkswagen Rabbit complies with the requirements of FMVSS 208, and therefore "is within the purview of the explicit preemption provision prohibiting states from requiring different restraints." *Id.* at 217, 501 N.W.2d at 869. Thus, Dykema's claims, which were based upon VW's alleged failure to provide reasonable adequate lower pelvic restraint, would establish a different safety standard from that required by federal law. *Boyle* specifically states that such claims are preempted. *Id; see Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (holding that for purposes of federal preemption, state law includes statutes, regulations, *and* common-law actions).

Accordingly, we conclude that the holding and analysis in *Boyle* controls and, therefore, the trial court erred when it failed to dismiss Dykema's action based on its lack of subject matter jurisdiction to hear the matter. However, because the trial court did dismiss Dykema's

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op. at 2. We conclude that nothing in *Derby* conflicts with our conclusion that *Boyle v. Chrysler Corp.*, 177 Wis.2d 207, 501 N.W.2d 865 (Ct. App. 1993), controls the disposition of this case.

As stated in *Derby*: "[T]he legislative history of the Safety Act demonstrates congressional intent to exclusively occupy the field insofar as Standard 208 permits manufacturers one of three options in order to prevent states from prematurely making air bags or automatic seat belts mandatory." *Derby*, slip op. at 6. We conclude that while other standards promulgated under the Safety Act may not evince congressional intent for federal preemption, FMVSS 208 does evince such intent, and thus, *Derby's* holding as to FMVSS 108 has no effect on our conclusion in this case.

complaint after the jury found in favor of VW, we affirm the post-verdict judgments that dismissed the complaint.

By the Court. – Judgments affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN: CIRCUIT COURT : Branch 16 MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

-vs-

Case No. 89-CV-15890

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, HEISER TOYOTA, INC., a Wisconsin corporation, AMERICAN HARDWARE MUTUAL INS. CO., a foreign corporation, STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

August 26, 1991,

HON. WILLIAM D. GARDNER
Circuit Judge, presiding.

DECISION

APPEARANCES:

HABUSH, HABUSH & DAVIS by MARK S. YOUNG, ESQ., appeared on behalf of the plaintiffs.

HINSHAW & CULBERTSON, by JEFFREY S. FERTL, ESQ., and FRANK SCHERKENBACH, ESQ., appeared on behalf of defendants Volkswagenwerk AG and Volkswagen of America, Inc.

RIORDAN, CRIVELLO, CARLSON, MENTKOWSKI & STEEVES, S.C., by ANNA M. PEPELNJAK, ESQ., appeared on behalf of defendants Heiser Toyota, Inc. and American Hardware Mutual.

Official Reporter – Joanna Koepp.

TRANSCRIPT OF PROCEEDNGS

THE CLERK: Erin Dykema versus Volkswagen et al., 89 CV 015890, motion to strike.

THE COURT: May I have appearances please?

MR. YOUNG: Representing the plaintiffs, my name is Mark S. Young.

MR. FERTL: On behalf of Volkswagen of America and Volkswagenwerk AG, Frank A. Scherkenbach and Jeffrey S. Fertl with Hinshaw and Culbertson.

MS. PEPELNJAK: Anna Pepelnjak appears on behalf of Heiser Toyota and American Hardware Mutual Insurance Company.

* * *

The matter before the Court today is the motion to strike affirmative defenses particularly as they relate to VWAG and VWOA, and also implied in some instances as to Toyota.

This motion to strike the affirmative defenses was timely made, and the Court considers the motion. The motion was filed within twenty days after defendant's responsive pleadings and well within the scheduling order time restraints. So I'm going to consider it.

* * *

The 8th Affirmative Defense of VWAG and VWOA alleges that Plaintiffs' negligence and strict liability claims predicated upon alleged inadequacies in the subject vehicle's restraint system are pre-empted by Federal Law. In this respect I thank counsel for all the law they submitted to me, and I read every bit of it. Found it, as I anticipated, a very very interesting question.

This Court is of the opinion that presumption be [sic] Federal Law invading as it does the sovereignty of the State ought not to be lightly presumed or easily found. The savings clause of the National Traffic and Motor Vehicle Act at 15 USC section 1397 (c) specifically provides that compliance with the Federal standards does not exempt any person from common law liability.

The rationale of Gingold versus Audi at 567 Atlanta 2d 312 is persuasive, although not controlling. The Court recognizing that is a Pennsylvania case. Federal regulations may have the same effect as Federal statutes. The underlying and critical question is whether Congress intended that Federal regulations supersede State law.

One need go no further than the clear language of 15 USC 1397 (c) to determine intent. Had Congress meant to pre-empt the claim before us, it could have done so and did not. VW's argument would negate any cause for

inclusion of 1397 (c) in the regulatory scheme, and one must assume a purpose and intent in its very existence. If one found it necessary to examine intent, the Congressional Record would support this Court's determination if that is the intent of Congress.

It must be remembered that Plaintiffs' claim is that Defendant's product was defectively designed. The question is not whether the vehicle did or did not have air bags or other passive restraints, but whether the vehicle was defectively designed. There was no attempt by the pleadings here to establish a new safety standard or to find Defendants liable for selecting one NASTA [sic] standard rather than another.

The Defendants' reliance on Comonwealth [sic] versus Johnson at 507 PA 27, 1985 case, as holding that Gingold is no longer persuasive in Pennsylvania since the Third Federal Circuit had held passive restraint claims were pre-empted, is incorrect in two respects.

First, Johnson held that a Third Circuit decision may be instructive. But Johnson did not reach the question of being bound by any Third Circuit decision. If you'll note the fact they use the words in there we disagree, and they went back to Smith versus Comonwealth [sic].

Johnson disagreed and did not reach the question of whether they were bound by it. And, secondly, the instant case, that is the case before us of Dykema, is not an air bag or passive restraining issue but defective design.

The Court is aware, as argued by defendant, that there was no question of implied presumption arising, Arbet versus Gussarson, 66 Wis. 2d 551 '75. But the Court is persuaded of the reliability of the logic there and citing 15 US Code Section 1397 (c). Arbet stated, "Thus Congress felt that Federal regulation should be supplementary to the common law products liability. Defendants' argument that problem of automobile design is exclusively legislative must therefore be rejected.

The asserted defense is not legally sufficient as a matter of law, and VWAG and VWOA's 8th affirmative defense is also stricken.

* * *

That's the Order of the Court.

MR. YOUNG: Thank you, Your Honor.

THE COURT: Mr. Young, you'll prepare an Order.

MR. YOUNG: I'd be happy to do that.

* * *

STATE OF WISCONSIN: CIRCUIT COURT : Branch 16 MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

vs. Case No. 89-CV-15890

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, HEISER TOYOTA, INC., a Wisconsin corporation, AMERICAN HARDWARE MUTUAL INS. CO., a foreign corporation, STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

ORDER

The plaintiffs' Motion to Strike Affirmative Defenses having come on for hearing on August 26, 1991, and the plaintiffs having appeared by Mark S. Young, and the defendants Volkswagenwerk AG (VWAG) and Volkswagen of America, Inc., (VWOA) having appeared by Frank A. Scherkenbach and Jeffery S. Fertl, and the defendants Heiser Toyota, Inc., (Heiser) and American Hardware Mutual Insurance Company (American) having appeared by Anna M. Pepelnjak, and the court having considered the briefs, submissions and arguments of counsel, and the court being otherwise fully apprised in the premises, the court makes the following orders:

1. The plaintiffs' Fourth Amended Complaint has been properly served upon the defendants, and Affirmative Defense No. 11 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that there has been improper process and improper service of process upon VWAG insofar as the Complaint contains a claim for punitive damages which has not been personally served upon VWAG as required by the Hague Convention and German law"), is hereby stricken.

2. Affirmative Defense No. 12 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that plaintiffs have waived or are estopped from asserting any claims, causes of action, or demands for punitive damages since said claims, causes of action or demands, which were contained in the plaintiffs' original pleading and Second Amended Complaint, were voluntarily dropped by plaintiffs when they filed and served their Third Amended Complaint"), is hereby stricken.

3. Affirmative Defense No. 9 in the Answer of VWOA and VWAG to the Plaintiffs' Fourth Amended Complaint, ("that the plaintiffs' claims for punitive damages are violative of the due process clause of the Fourteenth Amendment of the United States Constitution as well as the Constitution of the State of Wisconsin"), is hereby stricken.

4. Plaintiffs' Motion to Strike Affirmative Defense No. 7 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that the defendants, VWOA and VWAG, sustain no liability for the product in question as it was clearly misused, abused and substantially changed at the time of the alleged occurrence"), is denied.

5. Affirmative Defense No. 8 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that plaintiffs' negligence and strict liability claims predicated upon alleged inadequacy of the subject vehicle's restraint system are preempted by federal law"), is hereby stricken.

6. The Plaintiffs' Motion to Strike the Affirmative Defense stated in Paragraph 19 of the Answer of Heiser and American to the Plaintiffs' Complaint, which is incorporated by reference into the Answer of Heiser and American to the Fourth Amended Complaint, ("that certain claims within the plaintiffs' Complaint fail to state a claim upon which relief can be granted"), is denied, and the court will allow the plaintiffs to renew their motion to strike such affirmative defense if clarification is obtained from Heiser and American as to which claims said affirmative defense is directed.

7. The Plaintiffs' Motion to Strike the affirmative defense stated in paragraph 22 of the answer of Heiser and American to the plaintiffs' Complaint, which has been incorporated by reference into Heiser and American's answer to the Fourth Amended Complaint, in which Heiser and American "incorporate all applicable affirmative defenses raised by other defendants to this action" is granted with respect to those affirmative defenses of VWOA and VWAG which are hereby stricken in the preceding paragraphs of this order.

8. This case is removed from the trial calendar for November 11, 1991 and January 13, 1992.

9. This case is scheduled as the number 1 case set for trial commencing on July 13, 1991 at 1:30 p.m.

Dated at Milwaukee, Wisconsin, this ___ day of SEP 10 1991, 1991.

BY THE COURT:

HON. WILLIAM D. GARDNER
The Honorable William D. Gardner

Id: 30967

STATE OF WISCONSIN: | CIRCUIT COURT : Branch 16 | MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

-vs-

Case No. 89-CV-15890

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

August 25, 1992
Volume 27, A.M.

HON. WILLIAM D. GARDNER,
Circuit Judge, presiding.

JURY TRIAL

APPEARANCES:

HABUSH, HABUSH & DAVIS by MARK S. YOUNG, appeared on behalf of the plaintiffs.

HINSHAW & CULBERTSON, by FRANK A. SCHERKENBACH, JEFFERY S. FERTL, appeared on behalf of defendants Volkswagenwerk AG and Volkswagen of American [sic], Inc.

* * *

MORNING SESSION

(Whereupon, the following proceedings were had outside the presence of the jury)

THE COURT: Yesterday morning I had the court reporter call counsel to verbally inform counsel that I had denied defendant's motion so that you might be prepared to proceed today. This morning I'm going to read the rationale behind my decision.

This Court has previously held, and plaintiff does not now dispute, that the VWRA system complied with FMVSS 208. The question before the Court at this juncture is whether defendant may be held liable under State tort law where defendant exercised an option permitted by FMVSS 208. This Court has read and studied all briefs and law submitted by all the parties and affirms its pre-trial bench decision of August 26 of 1991, with respect to the preemption issue.

This Court has considered developments since the time of decision, especially Cipollone versus Leggett [sic] Group Inc. at 112 Supreme Court 2608 (1992) decision. I do not read Cipollone as extinguishing the concept of implied preemption. I do read it as instructive in analyzing the concept of implied preemption generally agreeing with Justices Blackmun and Scalia who separately bemoaned the difficulty lower courts would encounter in attempting to implement Cippolone [sic].

It is clear that the intent of Congress is the touchstone in considering preemption whether it be express,

inferred or implied. The intent of Congress, in my judgment, should be found, if found at all, in the clear meaning of the words used in the legislation or regulation.

This Court's reading of Section 1392 (d) which in its title includes the words "Supremacy of Federal Standards," states, "No State – skip words throughout – shall have any authority . . . to establish . . . any safety standard not identical to the Federal standard." A plain reading of these words lead [sic] the Court to believe that the Federal regulation precluded Wisconsin from enacting any conflicting standards. I believe and hold that such language does not relate to common law actions but to state statutes and regulations. Standards are not imposed by verdicts in tort actions. Note the distinction made by the lead opinion in Cippolone [sic] in discussing the words "no statement" as contrasted to "no requirement or prohibition."

In my judgment it was not the intent of Congress to preempt the common law tort action. This interpretation is consistent with and justifies the existence of the savings clause section 1397 (c) which provides that "compliance with any Federal Motor Vehicle standard issued under this subchapter does not exempt any person from any liability under common law." The suggestion by defendant that the savings clause related only to field preemption and not conflict preemption does not withstand scrutiny. The preemption intended by the legislation is found in Section 1392 (d) and to so restrict 1397 (c) is to misinterpret its plain meaning, a meaning which must be analyzed to be the intent of Congress to say what

it meant. This determination by the Court is also consistent with the statement in Arbet versus Gussarson, 66 Wisconsin 2d 551, a 1975 case.

"Thus Congress felt that Federal regulation should be supplementary to the common law products liability. Defendants' argument that the problem of automotive design is exclusively legislative must therefore be rejected."

The expressions of intent found in the Congressional Record also support the concept that it was intended that tort claims for negligent or defective design survived the enactment of the Safety Act. The Amendment of the Safety Act in 1991 related solely to intent of Congress not to change those decisions relating to inflatable restraints, an option which, by the way, was found not to be expressly preempted by the Safety Act. And those four were called air bag cases. Notably, Porkorny [sic] finds no implied preemption of the addition of safety nets, so I look at those as specifically air bag cases.

There's no question here nor has any been raised that there's any inferred preemption, but I thought I would discuss the question of implied preemption. This Court is not unmindful that damage and tort claims in State courts can affect manufacturers who have complied with Federal Regulations in their design of restraint systems. In the present case, it is clear that plaintiffs' case rests primarily on the lack of lower torso restraint, a lack that could be rectified by the installation of a manual belt according to plaintiffs' witnesses.

Since plaintiffs' [sic] are not required by law to prove an alternative safety design, citing Sumnicht, this cannot

be characterized as a "no lap belt" case. Plaintiffs' witnesses have testified that the VWRA system is defective in design and that a lap belt would have overcome the defect. Other designs may have been available that would have cured the defect, but it is not the burden of plaintiff to prove the alternative.

Plaintiffs' claim is not impliedly preempted by the Safety Act. The addition of a lap belt or other type of torso restraint wouldn't conflict with the Federal Standards but would supplement them. The compensation of victims, a function of state law, sets it apart from direct forms of regulations, and a manufacturer may choose a variety of actions to avoid liability or lessen its impact. Common law is not regulation. Sort of a distillation of what Justice Blackmun said in Cippolone [sic].

This Court is aware that its decision cannot be reconciled with O'Bryan versus VWRA [sic] and VWAG, the August 1992 decision of Charles Simpson, United States District Judge for the Western District of Kentucky. That case is not precedent for this case. It does not consider Wisconsin law and found essentially O'Bryan's claim would frustrate the federal administrative scheme.

I, to the contrary, find no such frustration. I find that the stated purpose of the Safety Act first and foremost was the safety of the consumer. Uniformity in my judgment was a goal only as to the standards.

The motion is denied.

Yes?

MR. YOUNG: Just want to make one comment for the record. I think in the first sentence you indicated

that we do not dispute that the system complies with 208. We have made record of our dispute on that issue. We do not dispute that is the law of this case based on your decision at this stage.

THE COURT: The way I said it, it does not now dispute.

MR. YOUNG: I didn't hear the now.

THE COURT: Yeah. I meant for this decision you didn't dispute it.

MR. YOUNG: We acknowledge you made that the law of this case, Your Honor.

* * *

STATE OF WISCONSIN | CIRCUIT COURT | MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

vs. Case No. 89-CV-015890

VOLKSWAGENWERK AG, VOLKSWAGEN OF AMERICA, INC., HEISER TOYOTA INC., AMERICAN HARDWARE MUTUAL INS. CO., STATE OF WISCONSIN, and THE TRAVELERS INSURANCE CO.,

Defendants.

JUDGMENT

The above-entitled action being brought on for jury trial on July 13, 1992, before the Honorable William D. Gardner, presiding circuit court judge, and the jury having rendered their special verdict, finding that the defendants, Volkswagenwerk AG and Volkswagen of America, Inc., were not negligent and that the subject Volkswagen vehicle was not defective and unreasonably dangerous; and that the plaintiff, Erin Dykema, was negligent and that such negligence constituted 100% of the causal negligence producing her injuries; and the court having considered the motions after verdict filed on behalf of the respective parties and entered an Order for Judgment dated March 1, 1993.

NOW, THEREFORE, it is adjudged:

1. That the complaint and various amended complaints of the plaintiffs, as well as any claims of the defendants, State of Wisconsin and the Travelers Insurance Company, against the defendants, Volkswagenwerk AG and Volkswagen of America, Inc. are dismissed on the merits.

2. That all other pleadings and causes of action set forth in the pleadings against the defendants, Volkswagenwerk AG and Volkswagen of America, Inc. are dismissed on its merits.

3. That the defendants, Volkswagenwerk AG and Volkswagen of America, Inc., be awarded costs as provided by law as against plaintiff, Erin Dykema, in the amount of $51,730.07.

IT IS FURTHER ADJUDGED:

In accordance with the provisions of sec. 806.01(1), Wis. Stats., that the residence, occupation or trade of the parties are as follows:

A. Plaintiff, Erin Dykema, resides at W255 N5725 Wrendale Drive, Sussex, Wisconsin; that Erin Dykema is currently unemployed.

B. Defendant, Volkswagenwerk AG, is a foreign corporation with its principal place of business located at 3180 Wolfsburg, Germany.

C. Defendant, Volkswagen of America, Inc., is a New Jersey corporation with its principal place of business located at 3800 Hamlin Road, Auburn Hills, Michigan.

Dated at Milwaukee, Wisconsin this 1 day of April, 1993.

GARY J. BARCZAK
Clerk of Courts

/s/ By Norma W. Forrai
JUDGMENT CLERK

Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE 608-266-1880

February 21, 1995

To:

Hon. William D. Gardner
Milwaukee County Circuit Court
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Milwaukee, WI 53233

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100 E. Wisconsin Ave. #2600
Milwaukee, WI 53202-4115

You are hereby notified that the Court has entered the following order:

Nos. 93-1341 *Dykema v. Volkswagenwerk AG, et al.*
and 93-2579 L.C. #89CV15890

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-cross respondent-petitioner, Erin Dykema, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Abrahamson, J., dissents.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 1

REMITTITUR

ERIN DYKEMA,
PLAINTIFF-APPELLANT-
CROSS RESPONDENT,
V.
VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,
DEFENDANTS-RESPONDENTS-
CROSS APPELLANTS,
STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,
DEFENDANTS-RESPONDENTS.

APPEAL NO. 93-1341

T.Ct. NO. 89-CV-015890

THIS CAUSE WAS AN APPEAL/CROSS APPEAL TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON NOVEMBER 08, 1994, THAT:

JUDGMENTS AFFIRMED.

MTS Wrote Decision/Opinion
PANEL: HON. MICHAEL T SULLIVAN
HON. TED E WEDEMEYER JR
HON. RALPH ADAM FINE

WITH COSTS TAXED AGAINST:

APPELLANT-CROSS RESPONDENT IN THE AMOUNT OF $5498.50.

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR MILWAUKEE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
FEBRUARY 23, 1995.

/S/MLG

MARILYN L. GRAVES
CLERK, COURT OF APPEALS

COURT OF APPEALS
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 1

REMITTITUR

ERIN DYKEMA, APPEAL NO. 93-2579
PLAINTIFF-APPELLANT,
V. T.Ct. NO. 89-CV-015890
VOLKSWAGENWERK AG, a foreign corporation and VOLKSWAGEN OF AMERICA, INC., a foreign corporation,
DEFENDANTS-RESPONDENTS,
STATE OF WISCONSIN, a sovereign body and THE TRAVELERS INSURANCE CO., a foreign corporation,
DEFENDANTS.

THIS CAUSE WAS AN APPEAL TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON NOVEMBER 08, 1994, THAT:

JUDGMENTS AFFIRMED.

MTS Wrote Decision/Opinion
PANEL: HON. MICHAEL T SULLIVAN
HON. TED E WEDEMEYER JR
HON. RALPH ADAM FINE

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR MILWAUKEE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

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/S/MLG

MARILYN L. GRAVES
CLERK, COURT OF APPEALS

49 C.F.R. § 571.208 S4.1.2

S4.1.2 *Passenger cars manufactured from September 1, 1973, to August 31, 1983.* Each passenger car manufactured from September 1, 1973, to August 31, 1981 inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3. . . .

S4.1.2.1 *First option – complete passive protection system.* The vehicle shall:

(a) At each front designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either: (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option – head-on passive protection system.* The vehicle shall –

(a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seatbelt assembly; and

(d) At each front outboard designated seating position, have a seatbelt warning system that conforms to S7.3.

S4.1.2.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.